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In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and
MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,
Petitioners,

vs.

LINDA ALCALA, JANE DOE and JOAN ROE, Individually and on behalf of all other persons similarly situated,
Respondents.

BRIEF AMICUS CURIAE OF THE STATE OF FLORIDA

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Petitioners,

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Respondents.

BRIEF AMICUS CURIAE OF THE STATE OF FLORIDA

INTEREST OF THE AMICUS CURIAE

The *Amicus Curiae* is the sovereign State of Florida. The interest of the State of Florida is twofold:

1. The substantial specific interest that the State of Florida has in two cases currently pending on the same issue;

   a. *Mixon* v. *Keller*, 372 F. Supp. 51 (M.D. Fla. 1974), *appeal docketed*, No. 74-2119, 5th Cir., April 30, 1974, *cert. in advance of judgment in 5th Cir. denied*, 43 U.S.L.W. 3213, U.S. S.Ct. No. 74-90 (Oct. 15, 1974), *petition for rehearing filed*, U.S. S. Ct. No. 74-90 (Nov. 6, 1974).

b. *Poole* v. *Endsley*, 371 F.Supp. 1379 (N.D. Fla. 1974), *appeal docketed*, No. 74-1997, 5th Cir., April 17, 1974, *cert. in advance of judgment in 5th Cir. denied*, 43 U.S.L.W. 3213, U.S. S. Ct. No. 74-90 (Oct. 15, 1974), *petition for rehearing filed*, U.S. S. Ct. No. 74-90 (Nov. 6, 1974).

The State of Florida was the *successful* litigant in both *Mixon* and *Poole*. *Mixon* was tried in the United States District Court for the Middle District of Florida and *Poole* was argued in the United States District Court for the Northern District of Florida.

2. The important general interest which any sovereign state has in the construction and application of an Act of Congress and its implementing Federal regulations which involve thousands of the state's citizens personally, as well as millions of dollars of the state's available resources, and the state's administrative system.

SUMMARY OF ARGUMENT

The issue presented for review by this Court is:

Does Title IV of the Social Security Act of 1935, as amended, [42 U.S.C. §601, *et seq.* (1970)] require, or even allow, fetal participation in the Aid to Families with Dependent Children program?

The State of Florida submits:

(1) That Title IV of the Social Security Act does *not* permit the award of Aid to Families with Dependent Children benefits to fetuses and cannot be so construed,

and

(2) That the United States Department of Health, Education and Welfare's implementing regulations, which proffer optional State participation in fetal coverage, are *illegal* since they are outside the scope of HEW's authority.

As a legal alternative, if this Court should rule that fetal coverage is somehow permissible within the perimeters of Title IV of the Social Security Act, then Florida submits that it is included only as an option.

The Social Security Act may be denominated hereafter as the Act and the Aid to Dependent Children Program as AFDC. The United States Department of Health, Education and Welfare may be referred to hereafter as HEW.

ARGUMENT

INTRODUCTION

The legal issues brought to the Bar by this case are easily set out and defined. The complexities that swirl about the issues involve definitions, legislative history, and interpretation of United States Supreme Court decisions and an Act of Congress. The State of Florida submits that the complexities may be untangled by a straight logical look, unclouded by protean emotion, at the Social Security Act and relevant court decisions.

Both sides to this controversy agree that the Social Security Act defines those eligible for the receipt of Aid to Dependent Children benefits. The disagreement arises as to what the relevant provisions of the Social Security Act actually mean.

Florida contends that the English language should be used, and was used by those who drafted the Act, in a simple, straightforward way. If verbal or mental contortions are necessary to force the Act to conform with the view of "what ought to be" then "what ought to be" is not what actually is. The Legislative branch of the government concerns itself with what "ought to be"; the Judicial, with what "is." Proponents of fetal coverage confuse the two.

Legal Aid Associations throughout the country are united through federally financed research centers that support them with theories and research for "legal reform." Under these circumstances, when the non-existent ball of "specific exclusion" is put into play it is run simultaneously in many states throughout this nation creating the illusion of a valid legal theory. In addition, the players in this charade refuse to drop the ball even when this Court has clarified *to the contrary* this so-called "theory."

The position of the State of Florida may be set forth briefly as follows:

1. Title IV of the Social Security Act does not include, or even allow, fetal coverage in the AFDC program. This position is buttressed by the plain language of the Act, the legislative history, and the court decisions. It follows that implementing HEW regulations are therefore illegal, the Act itself making no provision for fetal coverage.

2. As a legal alternative, *if* this Court should rule that fetal coverage is somehow permissible within the perimeters of Title IV of the Social Security Act, then Florida submits that it is included only as an option. In this instance the federal agency charged with the implementation of the Act would

be looked to and said agency interprets the Act as providing only an option.

This position of the State of Florida, which gives two alternative positions of the State, depending upon the view this Court takes on the first question of fetal coverage, is not contradictory in the legal sense. However, the position usually advanced by the proponents of fetal coverage *is* contradictory; in the usual, and in the legal, sense. Respondents contradictorily say, that HEW's interpretation must be looked to when consistent with their theory but must be ignored when not consistent with their theory.

Florida will discuss the two positions advanced separately, looking at the Social Security Act, HEW Regulations and court decisions in regard to both.

I. FETAL COVERAGE NOT ALLOWABLE

The State of Florida believes the correct position to be that the Social Security Act does not require, or even allow, fetal coverage, under Title IV.

A. *SOCIAL SECURITY ACT*

1. *Plain Language of Act*

The Social Security Act does not include coverage for fetuses under Title IV.

Title IV of the Social Security Act, Section 401 (Codified in 42 U.S.C. §601) establishes a cooperative federal-state welfare program designed:

> "For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each state to furnish financial assist-

> ance and rehabilitation and other services, as far as practicable under the conditions in such state, to needy, dependent children . . ."

In order to assist the poor, states may elect to participate in Title IV of the Social Security Act. If a state elects to participate, Aid to Dependent Children is furnished as defined in 42 U.S.C. §606 (a):

> "The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is *living* with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more such relatives as his or their own home, and (2) who is (a) under the age of eighteen, or (b) under the age of twenty-one and (as determined by the state in accordance with standards prescribed by the secretary) a student regularly attending a school, college or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment." (Emphasis supplied.)

The plain language of the Social Security Act itself appears to exclude fetal coverage.

In the literal sense, it is impossible to encourage the care of a fetus in the home of a relative other than the mother-to-be. In the technical sense, it is actually impossible for a woman to be a mother prior to the birth of a live child. Under ques-

tioning by the Court in the *Mixon*[1] case Plaintiff's own medical expert testified that prior to the live birth of a child the common terminology for a woman was "mother-to-be"; and that medically speaking she was not a mother until the birth of a live child.

Other portions of Title IV of the Social Security Act make sense only if the term "child" is limited to born children. For instance:

1. 42 U.S.C. §602 (a) (7) and (8) require consideration of the child's income and resources in establishing the amount of assistance. Obviously it is impossible for a fetus to have income or resources.

2. U.S.C. §602 (a) (11) requires notice to law enforcement officials when the state furnishes AFDC to a "child who has been deserted or abandoned by a parent."

3. 42 U.S.C. §602 (a) (17) requires the state to attempt to establish the paternity of a child *born* out-of-wedlock.

4. 42 U.S.C. §602 (a) (16) requires notice to court or law enforcement agencies of unsuitable home conditions due to neglect, abuse or exploitation of children receiving AFDC payments.

The citations above clearly indicate that Congress intended to include only born children in the class of dependent children referred to in 42 U.S.C. §606 (a). Numerous other sections of the Act make sense only if the term "child" means what it normally means, to wit: a born child.

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1 *Mixon* v. *Keller*, 372 F.Supp. 51 (M.D. Fla. 1974), *appeal docketed*, No. 74-2119, 5th Cir., April 30, 1974, *cert. in advance of judgment in 5th Cir. denied*, 43 U.S.L.W. 3213, U.S. S. Ct. No. 74-90 (Oct. 15, 1974), *petition for rehearing filed*, U.S. S. Ct. No. 74-90 (Nov. 6, 1974).

2. *The Word "Child"*

The law has always jealously guarded the legal meaning of any highly charged and important word within its structure. For decades case law has defined and redefined such important considerations as "child" and "fetus" and viable." These words form part of the superstructure of almost all aspects of the discipline of the law coming into play in such diverse sectors as probate, criminal law, negligence and contracts.

Medicine also has developed precise terms to define its particular needs. The Plaintiff *Mixon's*[2] own expert, Doctor R. Donald Garrison, a noted neonatologist, testified that a fetus is never medically or clinically referred to as a child, unborn or otherwise and that a fetus becomes a child at the instant of birth.

In many instances the medical and legal terms overlap. The Latin phrase *"in utero"* is such an example.

As pointed out by the District Court in the *Mixon* case at 54 it is inconceivable that the Congress of the United States is composed of men so "naive, unversed or shortsighted in medical terminology as to ignore or omit the term 'fetus' where it is alleged they specifically intended to include the same." Nor would the legal, as well as the medical, ramifications of the words "fetus" and "child" be lost upon members of Congress – many of them being attorneys.

Florida stands unconvinced by urgings that the dictionary definition of "child" includes "fetus." At first glance this argument might appear to have some meaning. Momentary

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2 *Mixon* v. *Keller, supra.*

reflection by any average man, however, calls forth the knowledge that extensive dictionary definitions frequently include alternative meanings having little or no relation to common usage, much less the technically correct medical or legal usage.

In the light of the technical aspects of the Social Security Act and the sophistication of the men who drafted it, Florida submits that the legal and medical meanings of the term "child" are the most relevant.

However, if this Court wishes to examine the ordinary usage of the word Florida submits that such examination will favor Florida's position. In normal conversational usage, "child" does not mean "fetus." This Court is being urged to say that "child" and "fetus" are interchangeable which is simply not the case. A woman is not considered to *have* a child when she is carrying a fetus – she is *expecting* a child. Until the birth of a live child, a woman is a pregnant female – not a mother. If the fetus is stillborn or aborted she does not have a child and does not become a mother. Only upon giving birth to a live child does a woman become a "mother" or "parent."

3. *Legislative History of Act*

Title IV of the Social Security Act grew out of the state-financed "mothers' pensions" programs which existed prior to the enactment of the Social Security Act in order to make it possible for widows to keep their children at home rather than send them to an almshouse or orphanage. So the absence of explicit references to unborn children in the Congressional debates relating to the original Title IV of the Social Security Act means that Congress never intended or considered the un-

born to be within the class of children which Title IV was intended to aid. Congressional concerns regarding prenatal care and infant mortality rates were manifested in other Titles of the Social Security Act.

House and Senate reports at the time the Social Security Act was passed discussed briefly the purposes of the several titles in the Social Security Act. The remarks about Title IV (AFDC) emphasized the plight of children during the Depression without mentioning pregnant women and fetuses. H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935); S. Rep. No. 628, 74th Cong., 1st Sess. (1935). At the same time Congress expressed a concern with the high maternal death rate and infant mortality rate existing in the 1930's in this country. This concern found expression through grants to the states for reducing infant mortality through Title V of the Social Security Act. 42 U.S.C. §701, *et seq.* However, it is *not* Title V, but Title IV under which the AFDC program is funded. It is Title IV which is the subject of this suit.

"Proof of legislative intent" to include the fetus is usually provided by quoting from material concerning Title V of the Social Security Act, *Maternal and Child Health and Crippled Children's Services.* This chapter is to provide "services for reducing infant mortality and otherwise promoting the health of mothers and children, . . ." 42 U.S.C. §701 (1). It is certainly possible here to dredge up many quotes which pertain to the fetus. However, as this Court is aware, Title V is separate and distinct from Title IV. It is inappropriate and misleading to quote legislative history pertaining to a title of the Social Security Act not even under consideration by this Court.

The following quote is from Mr. Ellenbogen in a statement to Congress which he made on May 20, 1935, at the time of the passage of the Social Security Act:

> "In our modern society, Social Security in its true sense means the enactment of laws that will safeguard the fundamentals of life to every human being *from the time of birth* until the time of death.
>
> * * *
>
> The child welfare laws and public health measures which we passed should *protect the child from the day of his birth* until he reaches maturity.
>
> * * *
>
> I visualize for the future Social Security laws which will accompany the individual from his cradle to his grave; Social Security laws which will step in and *watch over the child when it is born;* which will assure an education to every child according to his ability." 79 *Cong. Rec.* 7838, 7839 (Emphasis supplied.)

This clearly sets out Congressional intent.

The statement that Congress would have acted inconsistently if the Social Security Act includes unborns under Title V but not under Title IV shows a basic misunderstanding of the Act. Each Title stands alone. Each Title is implemented by separate regulations. A superficial perusal of the different Title names will show that all Titles are not interrelated. For instance, Title VI is *Grants to States for Services to the Aged, Blind, or Disabled.* 42 U.S.C. §801, *et seq.*

There is much talk of "consistent with the purposes of the Act." There is much pontification as to the benefits of prenatal care. The *legality,* not the desirability, of AFDC fetal coverage is what *should* be under discussion. As a practical matter thorough knowledge of the benefits available under Title IV might be helpful. Without any action by this Court,

a woman who gives birth to a live child will receive a three-month Medicaid backdate coverage for all bills (including doctor, hospital and drug) in connection with the birth, if timely application is made after the birth of said child who is found to be eligible for an AFDC money grant. 45 C.F.R. §206.10. It is not the purpose of the Courts to decide what is "consistent with the purposes of the Act." Many desirable ideas are consistent with the purposes of the Act and are not covered by the Act. This Court should decide the actual coverage provided under the Act.

B. *HEW REGULATIONS*

Florida therefore submits that the Social Security Act is clear on its face. HEW in its decision to allow options within the implementing regulations has made an administrative decision which expands the Act.

In 1972, both Houses of the 92nd Congress recognized the existing HEW practice of giving an option to the state as regards the inclusion of fetuses in the AFDC program. Both houses indicated that unborn children would not and should not be included in the proposed family assistance program in HR-1 (Codified as P.L. 92-603, 86 Stat. 1329) which would have applied on a uniform basis nationally had it been adopted.

The House Ways and Means Committee Report of H.R. 1, H.R. Rep. No. 92-231 at 184, 92nd Cong., 2nd Sess. (1972):

> "Your Committee wants to make clear that an unborn child would not be included in the definition of a child. This will preclude the practice, now used in the AFDC program in some States, of finding that an

> unborn child does meet the definition, thereby establishing a 'family' even before the child is born."

The Senate Finance Committee Report, S. Rep. No. 92-1230, at 108, 92nd Cong., 2nd Sess. (1972):

> "Regulations of the Department of Health, Education and Welfare *permit* Aid to Families with Dependent Children payments for a child who has not yet been born. The committee bill would make *unborn* children ineligible for AFDC." (Emphasis supplied.)

The Opinions in the Second Circuit and the *Mixon* case stated that the courts generally appeared unaware that the reason the legislation was not passed was because the Congress decided to deal only with adult categories of public assistance in HR-1.[3] The reports quoted above are often used by both sides to this controversy to reason to opposite conclusions. The salient point is the *reason* why the legislation was not passed. Proponents of fetal coverage attempt to confuse the issue by intimating that the Congress as a whole rejected the committee reports by failure to pass the legislation. This is simply not the case.

Instead, Congress, aware of the optional HEW plan to include fetuses, intended to force compliance with the intent and plain language of the Social Security Act. Florida submits that HEW has clearly overstepped itself and that Congress meant to correct the situation.

Adding great substance to Florida's contention that the HEW optional regulation is beyond HEW's authority is the

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3 *Wisdom* v. *Norton*, 372 F.Supp. 1190 (D. Conn. 1974) *rev'd*, No. 1058, Sept. Term 1973, 5675, 5688, (2nd Cir., filed Oct. 11, 1974); *Mixon* v. *Keller*, 372 F.Supp. 51, 55 (M.D. Fla. 1974).

way in which said "optional benefit" came into being. The Social Security Act was passed in 1935. No payments to fetuses, optional or otherwise, were ever considered or made until 1941. Federal participation was allowed in a fetal program in Wisconsin in 1941.

It is of interest how the question came to HEW. The State of Wisconsin did not formally request that fetal coverage be allowed under Title IV of the Social Security Act. Instead Wisconsin simply made payments on behalf of fetuses. Then auditors for the Social Security Board took exception to the Wisconsin program which made such payments. The Social Security Board, the predecessor of HEW, made a decision that the Board would approve federal financial participation in those states which included coverage of the unborn in their own program. At the time the State of Wisconsin was the only state making such payments.

This was an obvious attempt by the Board to avoid audit exceptions for the State of Wisconsin. This laudable concern for Wisconsin's finances grew into a policy of optional fetal coverage. At the time the first participation for fetuses occurred there was no understanding that the Board had construed the word "child" in the Social Security Act to include the term "fetus." The bureaucratic decision in regard to an audit exception involving one State grew to become a full-fledged nationwide option over a period of some years. It is important that there was never any perusal of the Act, informal or otherwise, in the policy decision that fetal coverage was an allowable option.

Fetal coverage was not added to the Handbook of Public Assistance Administration until 1946. Part 4, Section 3412.6. These provisions were similar to and are now superseded by

regulations in 45 C.F.R. §233.90 which purport to be only optional in nature.

C. *COURT DECISIONS*

There are two main bodies of case law to be dealt with. That in regard to the *Roe* v. *Wade* situation, 410 U.S. 113, 35 L.Ed. 2d 147, 93 S. Ct. 705 (1973), and that in regard to the *King, Townsend, Carleson* test, *King* v. *Smith*, 392 U.S. 309, 20 L. Ed. 2d 1118, 88 S.Ct. 2128 (1968); *Townsend* v. *Swank*, 404 U.S. 282, 30 L. Ed. 2d 448, 92 S.Ct. 502 (1971); *Carleson* v. *Remillard*, 406 U.S. 598, 32 L. Ed. 2d 352, 92 S.Ct. 1932 (1972).

1. *Roe v. Wade*

Respondents advance the theory, under the Fourteenth Amendment, of Equal Protection in regard to the unborn. This Court in *Roe* very clearly indicated the position of the unborn in regard to the Fourteenth Amendment. The Fourteenth Amendment is not applicable to the unborn.

Roe discusses the life of a fetus in relation to three trimesters. For approximately the first trimester the woman exercises sole right over the life of the unborn. She may at any time, for any reason, abort it. During approximately the second trimester the state has a limited right in regard to the unborn. Again the woman retains basic and compelling control. The state may only regulate, in promoting its interest in the health of the woman, the abortion procedures in ways that are reasonably related to maternal health. The woman during the first two trimesters, or until viability, exercises complete control over the existence or non-existence of the fetus she carries.

During the third trimester the state may *choose* to exercise its interest in the potentiality of human life by regulating or prescribing abortion. However, and this is the important point, if the state does not choose to regulate or prescribe abortion, the woman retains right of life or death over the fetus she carries. Therefore, if a fetus has no right to life (unless the state chooses within the last trimester to exercise some proscription of abortion) then the fetus certainly has no right to welfare. It would be illogical for any state to be required to pay welfare for a fetus that had no right to "equal protection" of the Fourteenth Amendment and whose continued existence was at the whim of the woman carrying same.

The mother is not the eligible party in the AFDC program. The child is the individual who is or is not eligible for the benefits of AFDC. The mother receives benefits under the plan only because she is the caretaker relative of the eligible individual. Threfore, the mother herself has no standing.

Since the right to AFDC comes through the child and not through the mother and since the fetus has no absolute right to existence it certainly has no right to welfare. To hold otherwise would put the state in the illogical position of possibly paying welfare and then having the mother decide to abort. The state might then be required to pay for the abortion under Medicaid!

2. *King, Townsend, Carleson*

The trilogy of cases continually cited by advocates of fetal coverage, to-wit: *King, Townsend* and *Carleson*, do not contain rulings helpful to their position. The State of Florida agrees that a State Plan for AFDC must include all individuals eligible under federal standards. In *King, Townsend* and *Carleson* the three groups seeking benefits were eligible un-

der applicable federal standards. Those who seek fetal benefits are not eligible individuals under applicable federal standards.

As stated in *Parks* v. *Harden*, 354 F. Supp. 620 (N.D. Ga. 1973), *appeal docketed*, No. 73-1855, 5th Cir., April 16, 1973, at 623:

> "More importantly an examination of the cases relied on reveals that the rulings were bottomed not on a variance between the State Plan and the HEW regulations, but on a variance between the state standard and the Act of Congress itself. Thus while some reliance was placed on administrative interpretation in *King*, the ultimate holding was that Alabama's "substitute parent" regulation conflicted with Congress's definition of "parent" in 42 U.S.C. §606 (a) (2) (b) in *Townsend*. Finally, in *Carleson*, California's exclusion of military personnel was held to violate the definition of "continued absence" in 42 U.S.C. §606 (a) (1). In each instance, the result came about through an ascertainable variance between the state standard and that expressed in the language of the statute as adopted by the Congress."

Florida complies with the language adopted by Congress. Seekers of fetal coverage have invented the theory of "specific exclusion" based upon their incorrect interpretation of *King*, *Townsend* and *Carleson*. Under this theory anyone not specifically *excluded* by Congress is *included*. This attempt to shift the burden of proof is inverted logic requiring Defendants to prove the item was expressly excluded instead of making Plaintiffs prove the item is included. To Florida this theory appears patently unsustainable. However, the problem of this theory being advanced simultaneously by Legal

Aid Associations across the nation results in a snowballing technique giving the theory some shimmer of reality.

The Supreme Court of the United States, however, has clarified the trilogy of cases in *New York State Department of Social Services* v. *Doblino*, 313 U.S. 405, 37 L. Ed. 2d, 668, 699, 93 S.Ct. 2507, 2517 (1973):

> "In this context, the dissenting opinion's reliance on *Townsend* v. *Swank*, *Carleson* v. *Remillard*, and *King* v. *Smith*, *supra*, is misplaced. In those cases it was clear the state law *excluded* people from AFDC benefits whom the Social Security Act *expressly provided* would be eligible. The court found no room either in the Act's language or legislative history to warrant the state's additional eligibility requirements." (Emphasis supplied, citations omitted.)

Even in the face of this Court's clear disavowal of the "specific exclusion" theory the contention is still advanced that since Title IV of the Social Security Act does not specifically exclude unborns they are thereby included in the Act. Florida rejects this mutilation of the Act and the Court decisions.

II. IF FETAL COVERAGE IS PERMISSIBLE IT IS ONLY AN OPTION.

Though Florida asserts that fetal coverage is not allowable under Title IV of the Social Security Act, *if* this Court should rule that fetal coverage is somehow permissible within the perimeters of Title IV, then Florida submits that it is included only as an option which any state may freely reject.

A. *THE SOCIAL SECURITY ACT*

Florida believes that the section on the legislative history

of the Act clearly demonstrates that Congress did not intend fetal coverage under Title IV. However, looking at the problem in the light most favorable to the fetal coverage advocates it appears that Congress may have "acquiesced" in HEW's optional coverage.

Bureaucratic implementation of an Act which falls *short* of the intended Congressional coverage is usually quickly corrected by Congress. Whereas, as a practical matter, expansion of intended coverage is usually dealt with in a more lenient and slower manner. However, it is apparent from the Committee Reports of the 92nd Congress previously quoted in this brief that Congress intended to stop the optional coverage.

Therefore Florida submits that if Congress had intended fetal coverage under Title IV, Congress would have acted to procure said coverage at some time during the period from 1935 to the present. If one wishes to say that there has been tacit congressional approval, one must look to see what the status quo actually is. HEW has administratively expanded the Social Security Act to include fetal coverage – but *only* as a State-elected *option*. So *if* there is tacit congressional approval, this is what has been approved – *optional* fetal coverage, not mandatory.

B. *HEW REGULATIONS*

Advocates of fetal coverage assert that the Social Security Act forces fetal coverage within the AFDC program. This belief would force the conclusion that the HEW regulations were incorreet in that they provided only an option. This would then mean that HEW's optional regulation interpretation as regards fetuses would not be acceptable to either side of the controversy. However, fetal advocates usually illogi-

cally assert that the Courts should look to the interpretation in 45 C.F.R. §233.90 as an "agency interpretation" of fetal coverage being included under the Social Security Act. They then assert that Courts should not look to the fact that this interpretation includes only optional fetal coverage. The optional part of the agency interpretation does not fit the fetal advocates' theory.

Fetal advocates often quote the principle that the interpretation of the agency charged with the implementation of an Act of Congress will be given substantial weight by the Court. Florida asserts that one may not pick and choose parts from the same agency interpretation. Either the agency interpretation is right or it is wrong. Florida asserts that HEW is wrong. However *if* this Court says that unborns could be included in AFDC under Title IV then Florida says that HEW is right and coverage is optional.

Fetal coverage advocates say HEW is partly right and partly wrong; they say the Court should defer to HEW practice as regards eligibility of fetuses but should not defer to agency practice as regards the optional nature of the coverage. However, Florida submits it is grossly illogical to demand adherence to agency policy when it suits one's arguments and to demand disregard of agency policy where it conflicts with one's arguments. Advocates of fetal coverage say, in effect, "Use HEW's interpretation" but "Don't use all of it."

Part 233 of Title 45 of the Code of Federal Regulations is entitled "Coverage and Conditions of Eligibility in Financial Assistance Programs." Within each subsection of this Part there are two divisions: "State Plan Requirements" and "Federal Financial Participation." The first section is mandatory requirements which must be complied with if the State assistance program is to receive Federal funding. The second sec-

tion establishes the conditions and limits on Federal funding and does not specify that States must participate in such funding or programs. The regulation under question by this suit permitting assistance to unborn children is not found in the mandatory "State Plan Requirement" Section, but in the optional "Federal Financial Participation" Section.

If fetal coverage was a mandatory requirement Florida would not have received HEW sanction of the State Plan.

> ". . . 42 U.S.C. §602 (a), (b) purports to set out the mandatory requirements for all state plans. Unborn child coverage is not a requisite therein nor in the penalties section. 42 U.S.C. §604." *Parks* v. *Harden*, 354 F.Supp.620, 625 (N.D. Ga. 1973).

An analogous option exists in 45 Code of Federal Regulations 233.10 (b) (2) (ii) (a) (1) which has been construed by the Court in *Townsend* v. *Swank, supra. Townsend* held that *if* a State *elected* an *option* that said option must be applied according to Federal requirements and that a State could not create eligibility requirements different from those Federally mandated. The Act clearly states that if an individual is "attending a school, college, or university, or regularly attending a course of vocational or technical training;", 45 C.F.R. §233.10 (b) (2) (ii) (a) (1), he may be covered. The State had, in effect, divided the option and was allowing AFDC for an individual attending vocational or technical school but not for an individual attending a college or university. This was an obvious violation of the Act in that only a part of the option was selected. The Court did not hold that because an option existed the state was therefore compelled to supply AFDC to those eligible under said option if the state had not elected the option.

Numerous other options for state assistance plans are authorized in the Federal regulations. As an example, 45 C.F.R. §248.10 (b) (3) provides an option as to medical assistance being available to "medically needy" persons. Florida has not elected this option and supplies Medicaid only to "categorically needy" (persons receiving financial assistance), not to the "medically needy" (persons of low income but not receiving welfare payments).

45 C.F.R. §206.10 (a) (6) gives the state an option as to the date the assistance payments may begin. In this case the state may elect the starting date for the beginning of financial assistance from the first of the month in which application is received to a date no later than the date of authorization of payment (but no later than 30 days after date of application).

Fetal advocates' illogical contention is that if an individual could be covered by an option in the Regulations, then said individual must be covered by it, whether or not the State has elected the option. This hypothesis has been resoundingly refuted:

> "A reading of the recent Supreme Court decisions leads to the conclusion that mere inclusion in the regulations does not in itself require the payment of benefits. That States still have latitude in their choice of programs is evident. However, if any program is once adopted, the state plan must meet minimal federal standards of coverage within the program . . . However, the regulations themselves do not require the inclusion of the unborn child as a mandatory recipient." *Parks* v. *Harden*, 354 F.Supp. 620, 623 (N.D. Ga. 1973).

C. *COURT DECISIONS*

Even if this Court should order that AFDC payments to fetuses were permissible it would be necessary to restrict the payments to a viable fetus in a state *which has chosen* to exercise its rights under *Roe* v. *Wade* to proscribe abortion in the last trimester; and has such valid statutes on its books.

CONCLUSION

Therefore, for the reasons stated, the State of Florida respectfully submits that the Judgment of the United States Court of Appeals for the Eighth Circuit should be reversed, and that this Court should find that Title IV of the Social Security Act does not permit Aid to Families with Dependent Children benefits for fetuses.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, EVA DUNKERLEY PECK, a Member of the Bar of the Supreme Court of the United States and Counsel of Record of the Sovereign State of Florida, hereby certify that I have served three copies of the foregoing BRIEF AMICUS CURIAE OF THE STATE OF FLORIDA by depositing the same in the United States Post Office, air mail postage prepaid this 15th day of November, A. D. 1974, to RICHARD C. TURNER, Attorney General of Iowa, and LORNA LAWHEAD WILLIAMS, Special Assistant Attorney General of Iowa, State Capitol, Des Moines, Iowa 50319, Attorneys for Kevin J. Burns and Michael Ryan, and ROBERT BARTELS, College of Law, University of Iowa, Iowa City, Iowa 52242, Attorney for Linda Alcala, Jane Doe, and Joan Roe. All parties required to be served have been served.

EVA DUNKERLEY PECK